INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statement	3
1. The recantations of Cantellops	5
2. Alleged newly discovered extrinsic evidence	13
3. The production of documents	17
a. The proceedings at trial	17
b. The notes of the narcotics agents	20
c. Notes and memoranda of Assistant United States Attorney Donald Shaw	30
Argument	33
The 61 pages of notes	37
The notes of October 10 and 11, 1957, consisting of 24 pages	41
Conclusion	48

CITATIONS

Cases:	
Campbell v. *United States*, No. 631, O.T. 1962, decided May 27, 1963	33, 36
Jencks v. *United States*, 353 U.S. 657	26
Killian v. *United States*, 368 U.C. 231	37, 46
Palermo v. *United States*, 360 U.S. 343	27, 35
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	27
Rosenberg v. *United States*, 360 U.C. 367	37
United States v. *Johnson*, 327 U.S. 106	33
Statute:	
18 U.S.C. 3500	36

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 194

NATALE EVOLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 195

SALVATORE SANTORA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 196

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 197

VINCENT GIGANTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79 MISC.

JOSEPH DI PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80 MISC.

CHARLES DI PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 115 MISC.

ROCCO MARSIC, PETITIONER

v.

UNITED STATES OF AMERICA

No. 149 MISC.

CARMINE POLIZZANO AND RALPH POLIZZANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 224 MISC.

CHARLES BARCELLONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (C.A.R. 42–53) is reported at 315 F. 2d 186.[1] The opinions of the district court (T. Tr. 9627–9693, 9834–9847; H. App. 1707–1755, 1784–1797) are reported at 197 F. Supp. 536 and 200 F. Supp. 711. A prior opinion of the court of appeals is reported at 274 F. 2d 179, certiorari denied, 362 U.S. 974, 982.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1963 (C.A.R. 42, 54). Petitions for rehearing filed by eight of the petitioners were denied

[1] The record consists of twenty-three volumes, as follows: (1) The complete trial transcript and most of the post-trial district court file, consisting of eleven consecutively paginated volumes, is referred to as "T. Tr."; (2) a separately paginated one volume appendix of the trial, filed by the petitioners, is referred to as "T. App."; (3) the complete four volume consecutively paginated transcript of the hearings on the motions for new trial is referred to as "H. Tr."; (4) the four volume consecutively paginated appendix of the hearings on the motions for new trial, which contains in addition certain selected exhibits introduced into evidence at the hearings, is referred to as "H. App."; (5) a one volume separately paginated appendix of the hearings on the motion and related data, filed by the government in the court of appeals, is referred to as "G. App."; (6) a one volume separately paginated transcript of the grand jury testimony of the witness Cantellops is referred to as "G.J."; (7) a one volume separately paginated record of proceedings in the court of appeals, filed by the petitioners, is referred to as "C.A.R."

We are lodging with the Clerk of this Court, in addition to selected materials above, the exhibits (exclusive of a few items such as the $500 bribe money, tape recordings, etc.) introduced into evidence at the hearings, to which reference will be made as "G. Ex." or "D. Ex." Other materials lodged by the petitioners are referred to descriptively.

on April 10, 1963 (C.A.R. 116–156). As to some petitioners, Mr. Justice Harlan extended the time for the filing of petitions for writs of certiorari to various dates up to and including June 10, 1963. All petitions of writs of certiorari were filed within thirty days from the entry of judgment or from the denial of the petitions for rehearing in the court below, or within the time as extended by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, after full hearings, the district court properly denied motions for new trial filed subsequent to affirmance of the convictions and based on:

(a) Disavowed recantations of trial testimony by the chief government witness;

(b) The government's failure to produce certain notes of interviews with the chief prosecution witness; and,

(c) The destruction of certain notes of interviews with the same witness, which had been incorporated in reports made available at trial.

STATEMENT

After a three-month trial in the United States District Court for the Southern District of New York before the late Honorable Alexander Bicks and a jury, petitioners and two others were convicted in April 1959 of having conspired to violate the Narcotic Drugs Import and Export Act. Their convictions were affirmed on appeal, and this Court denied petitions for writs of certiorari. 274 F. 2d 179, certiorari

denied, 362 U.S. 974, 982. The evidence at the trial is summarized in detail in the government's brief in opposition in that case. Nos. 735, 763, 772, 807, 812, 817, 750 Misc., 792 Misc., 793 Misc., and 840 Misc., O.T., 1959. In general it showed that Cantellops, the principal government witness, made a number of trips to cities in the United States (Las Vegas, Chicago, Cleveland, Miami and Philadelphia) for the purpose of picking up or delivering narcotics either with or at the behest of various petitioners; that a number of narcotic transactions involving some of the petitioners and others were consummated; and that various petitioners attended meetings at which the importation, distribution and territorial control of narcotics were discussed and planned.

On August 26, 1960, two months after Genovese's petition for rehearing was denied by the Court (363 U.S. 858), petitioners moved for a new trial on grounds of newly discovered evidence, alleging that Cantellops had recanted his trial testimony and that newly discovered extrinsic evidence showed that he had given false testimony at the trial. A protracted hearing on the motions was held before Judge Bicks, beginning in early 1961. During the proceedings, the court allowed the petitioners to amend their motions to include allegations that government agents had deliberately suppressed evidence in the case by the destruction of records which otherwise would have been available at the trial.

On May 1, 1961, Judge Bicks denied the motion on all grounds except as to the issue whether an Assistant United States Attorney's notes and memoranda,

which were not produced at the trial, were within the scope of 18 U.S.C. 3500 (T. Tr. 9627–9693; H. App. 1707–1755). 197 F. Supp. 536. In August 1961, due to illness of Judge Bicks, the Honorable Thomas F. Murphy was assigned that part of the proceedings upon which Judge Bicks reserved decision. (H. App. 1758). On December 22, 1961, Judge Murphy denied the remainder of the motions (T. Tr. 9834–9847; H. App. 1784–1796). 200 F. Supp. 711. The court of appeals unanimously affirmed. 315 F. 2d 186.

1. *The recantations of Cantellops.*

Although only three of the petitioners (Santora and the two Polizzanos (No. 1167, and No. 1515 Misc.)) raise any issue in this Court as to the denial of the motion for a new trial on the basis of the recantations of Cantellops, and although the evidence of that motion is fully discussed in the opinion of Judge Bicks (197 F. Supp. 536), we are setting forth a summary of the evidence in respect thereto to direct the Court to the pertinent parts of the record, and as background for the other issues raised.

a. Cantellops was subpoenaed as a defense witness at the hearing on the motions for new trial. He testified under sequestration and without having discussed his testimony with agents of the government (H. App. 191–192, 214–215, 219, 314–321, 855–856, 966–967, 986; see G. App. 20–21). He reaffirmed the truth of his trial testimony (H. App. 213; see H. App. 193, 246, 268–269, 2015, 2034).

b. Cantellops had testified before the grand jury prior to the trial that he knew that people who talked "just disappear[ed]" (G.J. 116–120, 138–139).

While the original case was pending on appeal, Cantellops' sister-in-law was killed by an automobile driven by a "Joe" (Joseph Marino) who had been making inquiries in the neighborhood as to the whereabouts of Cantellops (H. App. 302–304).[2]

During January 1960, while the case was pending on petitions for certiorari, Cantellops received a number of threatening telephone calls by unidentified parties (H. App. 138, 144). John Ormento and Carmine Galente, defendants in the indictments who had been fugitives at the time of the trial, were at large during this period. Ormento himself telephoned Cantellops at a restaurant on a number of occasions. He said that as long as Cantellops "play[ed] the game" with him Cantellops did not have to worry, but otherwise "they knew where all [his] family were" (H. App. 131–144). Orlando Ramos, a dishwasher at the restaurant, testified that Cantellops appeared "nervous" and paced back and forth after a certain telephone call, and that Cantellops told him that "he was in a dangerous business" (H. App. 1316–1317).

c. About January 22, 1960, Ormento spoke with Cantellops for about 15 or 20 minutes in Cantellops' restaurant (H. App. 144–145, 1319). Ormento gave Cantellops a typed draft of a statement (G. Ex. 2) which he wanted Cantellops to sign (H. App. 394–395). It recited that Cantellops had never met Ormento or Galente, that Cantellops had lied at the

[2] At the hearings on the motion, Marino claimed the privilege against self-incrimination as to questions about the accident, as to whether he was related to the accomplice, Salvatore Marino, and as to other matters (H. Tr. 2364–2368).

trial because of promises made to him by the United States Attorney and by narcotic agents, and that these people rehearsed his trial testimony with him "about one hundred times" (G. Ex. 2). The spaces for the names of the United States Attorney and narcotic agents were blank, and Ormento told Cantellops to fill in the blanks with any names he wanted (H. App. 394–395). Ormento gave $20 to Ramos (who did not hear the conversation) and $50 to Cantellops (H. App. 1319–1320, 2031). After Ormento left, Cantellops told Ramos to telephone the Narcotics Bureau in the event that something "happened" to him and that Ramos should try to be with Cantellops all the time (H. App. 1349, 1350; see H. App. 141–142; G. App. 63). Shortly thereafter, Cantellops wrote out his first recantation statement and gave it to Ormento (H. App. 145). On the following day, Ormento returned the statement saying that it was "no good" (H. App. 145).

Later, Ormento agreed to give Cantellops $3,000 as an installment on $30,000 to be paid for another recantation statement (H. App. 139–140, 146–147). Ormento offered Cantellops $100,000 if he would recant as to the other defendants, the deal being that Cantellops would receive $3,000 as the first installment, $27,000 as the second installment, and the balance as the "deal" progressed (H. App. 163–164, 166–168, 379–380).

d. About January 26, 1960, Cantellops, in accordance with arrangements made by Ormento (H. App. 467–469; see H. App. 1534–1541), went to the rectory of the Mount Carmel Catholic Church in the Bronx.

692-938—63——2

He was accompanied by Ramos, who waited outside (H. App. 1320). Siegal telephoned Cantellops at the rectory, explaining that the lawyers had been there but left because they feared that he had brought F.B.I. agents with him (H. App. 222–224). Siegal instructed Cantellops to meet him later at his office (H. App. 222–224).[3] That evening, at Siegal's office (H. App. 231–234, 397–399), Ormento "dictated" or "suggested" a statement (H. App. 224, 229–234) in which Cantellops retracted his testimony about Ormento and Galente (H. App. 476–477; G. App. 28). Ormento then gave Cantellops $200 (H. App. 382, 383, 1322; see H. App. 844, 852). On the following day, a messenger returned the statement to Cantellops with the message that it was not "strong enough" because it did not contain the names of the government agents (who allegedly suborned the perjury) (H. App. 228–230).

On January 27, 1960, in the rectory of the same church, Cantellops met with a priest and attorneys Siegal (representing Santora), Wilfred Davis (representing Genovese) and Amedeo Lauritano (representing Pappadio). Unbeknownst to Cantellops or the priest, Lauritano brought with him a recording device, concealed in a case, which he turned on during the conference (H. App. 402–403, 478, 498–500). A notary was called, and the statement which Can-

[3] Siegal testified that he watched the church from across the street, that he saw a Spanish-looking man whom he did not recognize enter the church, and that when he did not see Cantellops enter he left without checking whether Cantellops was there (H. App. 469–472, 1320).

tellops had previously written in the rectory was signed and notarized (H. App. 131–132, 404, 496, 499). At that point, Attorney Davis asked Cantellops some questions (T. Tr. 2959–2962; H. App. 401, 499; G. App. 26). "Under those circumstances", Cantellops later testified he "had to say" that his conscience bothered him, that he did not know Ormento or Galente, and that Narcotic Agent William Rowan suggested testimony to him about Ormento (H. App. 134–135; see H. App. 500).[4] The meeting then broke up, and Cantellops walked out of the rectory with the notarized statement. He delivered the statement to Omento in Siegal's office out of Siegal's presence after he received $3,000 in $100 bills from Ormento (H. App. 188–189, 371, 383; see H. App. 846, 849–850).

e. On February 3, 1960, Cantellops testified before a grand jury which was investigating his recantations set forth above. He told the grand jury that his recantation was not true, and that he had testified truthfully at the trial (H. App. 2015, 2034). At about this time, he told the government agents about the $3,000; gave them a statement as to how he spent approximately $2,500 and turned over to them $500 in $100 bills (H. App. 364, 371, 381–387, 391–392, 850–851, 853, 962, 977–978, 1937; G. App. 53–57). Cantellops also wrote out two statements for the government in which he recited the contacts by Ormento and reaffirmed his trial testimony (H. App. 2000–2003, 2004–2011; Court's Exs. 1 and 2).

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[4] The tapes were admitted but much of the conversation was "incomprehensible" (H. App. 505).

f. In early July 1960, Cantellops received a message to telephone Siegal, which he did (H. App. 181, 183, 236). Cantellops, who testified he was "under threat from outside" at that time, said he "went along with the game to see all about this" (H. App. 194). Ormento told Cantellops that "Siegal and I are arranging. Everything he does is all right" (H. 194).

On July 20, 1960, Cantellops met Siegal at the entrance of the building where Siegal had his office (H. App. 183–184, 234; see H. App. 407, 412).[5] There, the two men began to discuss one Joseph Linares, and Siegal said that it would be a "great help" if Cantellops went along with Linares' testimony (H. App. 184). Siegal then gave Cantellops a "lay-down of what he wanted done" (H. App. 197). The idea was that Cantellops was to change his testimony concerning the Las Vegas trip, i.e., the first of Cantellops' many trips for the conspirators (H. App. 184).

After a few minutes of discussion, the two men went up to Siegal's office. Siegal had a special recording device (with a microphone inside a telephone receiver) which was turned on during the conversations with Cantellops at that time and on July 22 (H. App. 413–414, 424, 428, 430–431).

The "main thing" Cantellops said was that "they wanted a change in testimony" (H. App. 185). Siegal made the "suggestion" that there "should be the denial of knowing these people in certain places

[5] Cantellops met Siegal at his office earlier in July (H. App. 181; see H. App. 407). Cantellops telephoned Siegal's office about seven times during July (H. App. 235).

and meetings" (H. App. 195). Siegal wanted Cantellops to say that the "Mexican" was a "con-man" who had nothing to do with narcotics (H. App. 196). At the suggestion of Siegal, Cantellops said that he had not been at Mazzie's house and that a meeting with Genovese never took place (H. App. 202–203, 205, 213–214). Cantellops told Siegal that he had not seen Santora until the time he entered the court room because Siegal "wanted that, so I told him that not as a fact but as a way that he wanted it to be said" (H. App. 194). According to Siegal's "wishes," Cantellops said that he was "lectured" by narcotic agents on what to say between his first and second grand jury appearances (H. App. 199). Cantellops told Siegal a "lot of things" which were "on rehearsal at that time" (H. App. 193). Siegal "changed and improved" Cantellops' answers (H. App. 204–205).*

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*Much difficulty was encountered in playing back the Siegal tapes, and a technician eventually got the tape of July 20 to play by manually holding the tape back to slow it down (H. App. 420–421, 424, 426–428). Siegal testified that he had made no changes or erasures on the tapes and did not re-record any part (H. App. 417–419). Reiter, the man who sold Siegal the recording device in question, which was a 60 cycle machine, testified that while he was in Siegal's office he observed that Siegal also had a 50 or 60 cycle German recording machine (H. App. 1433, 1435, 1438, 1440–1442). Reiter testified that when he played the tape of July 20 outside of the court room, he held the tape back in order to get it to play, that quite suddenly it went all off altogether, and then, when released, was on speed (H. App. 1437).

In Reiter's opinion, the first two-thirds of the tape was not an original recording on the machine sold to Siegal, or if it was an original recording, it had been subsequently

g. On July 27, 1960, Cantellops was arrested for a parole violation and was imprisoned in the "Tombs" in New York City.[1] The next day he was threatened and "brutally beaten" by unidentified parties (H. App. 220–221, 286, 302, 313).

In September, 1960, Cantellops wrote a letter to Siegal in an effort to protect his life while in jail and to prevent "drastic action by these people against certain members of my family" (H. App. 305–307; D. Ex. "F").

During a period beginning in August 1960, the same "Joe" who had killed Cantellops' sister-in-law was "pushing" Cantellops' son, Nelson Silva (H. App. 220, 323–324). Nelson Silva visited Cantellops on most of the visiting days while "Joe," who accompanied Nelson Silva to the jail, remained outside, often visible to Cantellops inside (H. App. 330–331). During this period, "Joe" told Ramos that he wanted him to get Cantellops "to help some friends," and said that he would give Ramos some money (H. App. 1342; see D. Ex. G–2). "Joe" had asked Cantellops' wife to tell Cantellops in a letter to please help one of "Joe's" friends, which she did (G. App. 84; D. Ex. G–1). In the meantime, "Joe" was supplying Cantellops' wife with money on a regular basis (H. App. 323–324, 340–341, 1340–1341; G. App. 82–83, 85;

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transcribed on another machine (H. App. 1436–1441, 1445; G. App. 73–79).

[1] From that time to about the commencement of the hearings on the motions for new trial, Cantellops spoke with the government agents only on two or three occasions. He did not mention his meetings with Siegal because he did not consider them serious (H. App. 192–194).

D. Exs. G–1, G–3, G–4).[*] Cantellops then gave a letter (apparently to Ramos; see D. Ex. G–1) in blank with the names of the individuals to be affected thereby to be filled in later (H. App. 220).

h. The District Court ruled that the "circumstances surrounding each alleged recantation incline the Court to the view that they were the result of coercion, bribery and misdealing and, therefore, entirely unworthy of belief." 197 F. Supp. at 540.

2. *Alleged newly discovered extrinsic evidence.*

a. At the original trial, Cantellops testified that in 1955 Barcellona told him that he could repay a loan of $500 by taking a trip for the purpose of delivering "junk," *i.e.*, narcotics (T. Tr. 983–987). Cantellops agreed to the proposition. He met with Barcellona, Joseph Di Palermo, the Polizzano brothers and Anthony Colonna and discussed the manner in which the "package" should be carried (T. Tr. 993–998). Later Barcellona instructed Cantellops to go to the "Golden Nugget" Casino in Las Vegas and try to make contact with Carmine Polizzano there. He said that if Polizzano did not show up right away, that Cantellops was to rent a cheap room and wait

[*] In one letter (D. Ex. G–1), the wife said that a "man" was going to bring a new refrigerator, and she asked for advice on what to do (H. App. 340). Nelson Silva had told Cantellops that "Joe" had used the word "refrigerator" to mean money (H. App. 340–341). Other letters from Cantellops' wife indicated that she was receiving money from a "man" (D. Exs. G–3, G–4; see G. App. 84). A letter from Ramos indicated that he had been contacted by "Joe" who wanted a "letter" from Cantellops (D. Ex. G–2; see H. App. 338–339). These letters were subsequently turned over to agents of the government (H. App. 341–342).

there until Polizzano met him (T. Tr. 1000). An unidentified man handed Cantellops a four to six pound gift wrapped package (T. Tr. 1002–1003). Cantellops then left for Las Vegas by way of a flight to Los Angeles.

In Las Vegas, Cantellops went to the Golden Nugget Casino but was unable at first to locate Carmine Polizzano (T. Tr. 1013–1015, 2407, 2804–2805, 3206–3207). He rented a "cheap room" and "hung around" the Casino, eventually obtaining employment as a card dealer (T. Tr. 1014–1016, 1017, 2402–2403, 2406–2409, 2750, 2752–2758, 2768, 2769, 2771, 2774, 2778, 2786, 2788, 3206, 3461–3462). During this period, he met Carmine Polizzano who introduced Louis Fiano to him as "the man that will get the gift with the stuff" (T. Tr. 1020, 1021–1022, 1025–1027, 2409–2417, 2805, 2824, 3207). Later that evening, Cantellops handed Fiano the gift wrapped package of narcotics and wished him a "Happy Birthday" (T. Tr. 1027–1028). Polizzano gave Cantellops some money and left (T. Tr. 1030). Shortly thereafter, Cantellops left Las Vegas and returned by automobile to New York "with one of those fellows from New York who lost his money and needs gas and expenses to come back" (T. Tr. 1030; see T. Tr. 2419–2427, 2436–2440, 2444–2454). Cantellops had remained "closer to two weeks" in Las Vegas (T. Tr. 2750–2752; see T. Tr. 2735–2736), and had enough money for the return trip to New York.

b. At the hearing on the motions for new trial, Cantellops testified that in January or February 1955 he had been arrested in New York City with Joseph

Linares in a conspiracy case involving the substitution of a zircon stone for a diamond, and that he and Linares were thereafter released on $500 bonds (H. App. 289–290, 291, 348–349, 359; see H. App. 1964–1972). The Las Vegas trip, however, had nothing to do with Cantellops' involvement in the "diamond conspiracy" case (H. App. 348–349). After Cantellops had completed the purpose of the Las Vegas trip and while he was still in the city, Linares and one Dominick Stella, a narcotics "pusher" and a gunman for the syndicate, respectively, met him there in order to bring him back to New York City for the syndicate (H. App. 287, 292, 348–349).* Cantellops then returned to New York by automobile with the two men, sharing expenses on the way back (H. App. 287, 292, 349). Cantellops testified that he suppressed what he knew about Linares and Stella at the trial because he "was afraid" since they knew Cantellops' family (H. App. 287, 293, 294–295, 296–297, 357). He said that Linares and Stella were "dangerous," and that he kept out of the case those people who could hurt his family (H. App. 294–295).

c. Linares testified that when Cantellops did not appear in court, he began to look for him, eventually discovering that he had gone to Las Vegas (H. App.

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*The Government's evidence showed that on May 6, 1955, one Orlando Seda was arrested in Linares' apartment where about eight ounces of heroin were found and seized (H. App. 1462–1464, 1479, 1661–1663, 1667, 1673–1674, 1679–1680, 1684; see H. App. 598, 609, 762). While the detectives were in the apartment, Stella knocked on the apartment door and entered (H. App. 1674–1675). Shortly thereafter, Stella was arrested and later convicted for the possession of six or seven ounces of heroin in his apartment (H. App. 1471).

577–580, 607–608, 612–615; see H. App. 1966). Linares said that he was "responsible" for Cantellops since his friends had posted the bond, and that Cantellops was the only person who could "clear" him of the charge (H. App. 601, 619; see H. App. 778, 779, 1693–1695, 1697, 1699).

Linares and his friend Stella drove in Seda's automobile to Las Vegas where they met Cantellops (H. App. 580–581, 599, 626–627, 629, 778, 779, 786–787, 1691–1692). According to Linares and Stella,[10] Cantellops said that he had come to Las Vegas in order to gamble, that he had lost his money there, and that he had not eaten in two or three days (H. App. 582–585, 631, 634, 782). Linares paid Cantellops' room rent and the three men spent the night in Cantellops' room with Linares and Stella taking turns watching Cantellops (H. App. 583–584, 616–618; cf. H. App. 781). On the following morning, the three men left Las Vegas in Seda's automobile and returned to New York (H. App. 583–585, 785). According to Stella, the Las Vegas trip had nothing to do with narcotics (H. App. 634–635, 637). Linares did not deal in narcotics and

[10] Before the diamond conspiracy case could be disposed of, Linares left for Puerto Rico where he was arrested and subsequently pleaded guilty to charges of robbery and violations of the Arms Law (two charges) of Puerto Rico (H. App. 590, 593, 598; G. Exs. 6 and 6A). He had also jumped bail from Puerto Rico on these charges.

At the time of the hearing, Stella was serving a sentence in the Clinton Prison in New York on a state conviction (H. App. 626, 1593). He had three felony convictions, including one for robbery and one for narcotics, and had been committed to the Dannemora State Hospital for the criminally insane from July 1957 to August 1959 (H. App. 634–635, 637, 638, 774–776, 1593; see H. App. 804–805, 807–809).

never knew Cantellops to be connected with narcotics (H. App. 586, 612; see H. App. 794–795). Stella said that he did not enter the narcotics traffic until after he returned to New York from Las Vegas (H. App. 634–635, 637). In New York, there was no need for Linares or Stella to watch Cantellops (as they had done in Las Vegas) because they were convinced that they had no reason to worry that he would return to Las Vegas (H. App. 785–786).[11]

d. The district court ruled that the only demonstrably false trial testimony of Cantellops with respect to the Las Vegas trip touched upon the identity of the individual with whom he returned; that such evidence did not bear on the material issues in the case; and that had Cantellops identified Linares and Stella at the trial that testimony would rather have tended to tie Cantellops closer to the conspiracy. 197 F. Supp. at 548–549.

3. *The production of documents.*

a. The proceedings at trial.

At the trial, toward the close of the government's direct examination of Cantellops, the court ordered the United States Attorney to make Cantellops' grand

[11] At the hearing, Stella testified that he signed the affidavit (G. Ex. 13) attached to Genovese's motion papers while in prison, following an interview with Albert Kreiger, attorney for the Di Palermo brothers (H. App. 632, 789; see H. App. 809–810, 818–819, 1593–1594). Kreiger, who visited Stella on seven occasions from October 1959 to June 1960 (G.E. 38), testified that Stella read the affidavit over before signing it (H. App. 819–820; see H. App. 1597). Stella, however, had difficulty reading the affidavit at the hearing and the court observed that Stella "[o]bviously * * * never read this affidavit" (H. App. 799–800).

jury testimony available to defense counsel (T. Tr. 1392).

Defense counsel also requested that the government turn over to them all copies of statements and reports of government agents dealing with the witness Cantellops (T. Tr. 1395, 1591–1592, 1610). The United States Attorney turned over the grand jury testimony and statements from Cantellops dated October 10, 1957, and January 16, 1958 (T. Tr. 1392, 1400–1401, 1479, 1592, 3266–3268).[12] In addition, the United States Attorney submitted to the court the complete files of the New York Branch of the Bureau of Narcotics on the case (T. Tr. 1592–1593, 1615, 2018). The court spent about thirty hours examing these files (T. Tr. 2052), and, on February 4, 1959, conducted *voir dire* examinations of Narcotic Agents John Enright (T. Tr. 2013–2018, 2039–2042), Norman Matuozzi (T. Tr. 2019–2024), Anthony Consoli (T. Tr. 2030–2039) and Armando Muglia (T. Tr. 2042–2045) in order "to aid the Court in determining whether any of [the reports came] within subdivisions 1 and 2 of (e) of Section 3500" (T. Tr. 2013). The court turned over reports which the agents said were

[12] The statement of January 16, 1958, was not turned over to defense counsel until February 19, 1959, when it was located by the United States Attorney (T. Tr. 3267). The United States Attorney informed the court at that time that "in the preparation of this case from its inception * * * many different Assistant United States Attorneys have been involved, and during the course of the trial when counsel have asked whether certain documents were in existence I continually conferred with them, and this one turned up. When it turned up we turned it over" (T. Tr. 3268).

substantially verbatim accounts of statements from Cantellops (T. Tr. 2013–2018, 2019–2025, 2033–2037, 2042–2044).

On February 18, 1959, at the suggestion of the government, the court conducted a *voir dire* examination of Narcotic Agent William Rowan concerning four of his reports (T. Tr. 3159–3173). Rowan testified that his "notes" of interviews with Cantellops, on which his reports were based, were not in existence, and the court refused to inquire, as suggested by counsel for Evola and Gigante, whether the notes had been "destroyed" (T. Tr. 3170). The court ordered portions of four of Rowan's reports which, according to Rowan's testimony, were substantially verbatim accounts of what Cantellops had told him turned over to defense counsel (T. Tr. 3172–3173; see H. App. 2058–2061).

On cross-examination, Cantellops testified that he had been interviewed on numerous occasions between the summer of 1957 and into 1958 by Assistant United States Attorney Donald Shaw; that Shaw had examined him before the grand jury; and that thereafter he had been interviewed by Assistant United States Attorneys Walsh and Tendy, and by United States Attorney Arthur Christy (T. Tr. 1564–1566, 1579–1585, 1587–1591, 1631, 1651–1652, 1887–1890, 1896–1897, 1907–1909, 1935–1936, 1957–1958, 1963–1966, 2218–2228, 2257A, 2292, 2295, 2650–2651, 2867, 2904–2907, 2915, 2935–2950, 3441–3442, 3452, 3466–3468, 3527; see also T. Tr. 1934–1938, 2277–2278, 2281, 2296; G.J. 1, 31, 74, 123, 133, 171, 190). Stenographers were present at times during the interviews with

Shaw, and, on occasion, Cantellops observed Shaw taking notes or writing while he spoke (*e.g.*, T. Tr. 1584–1585, 1907–1909, 2218–2221). Assistant United States Attorneys Tendy and Walsh also sometimes took notes while Cantellops spoke (*e.g.*, T. Tr. 1587–1589). The interview notes taken by the Assistant United States Attorneys were not specifically requested by defense counsel during the trial, nor did the petitioners complain when the notes were not produced at the trial for an *in camera* inquiry by the court.

Petitioners did not challenge on appeal from the convictions the various rulings or procedures undertaken by the court at the trial as to the production of materials under 18 U.S.C. 3500. In his petition for a writ of certiorari from the conviction, petitioner Genovese contended that there was nothing in the opinion of the court of appeals to show that the court had given consideration to the rulings of the trial judge regarding production of reports of statements of Cantellops.

b. The notes of the narcotics agents.

(1) From about mid-1957 to about March 1958, Narcotic Agents Rowan and Consoli were attached to an enforcement group which performed investigative work on the instant case directly under the supervision of Assistant United States Attorney Shaw. Rowan operated primarily as a chaperone because Shaw, who did most of the interviewing of Cantellops, would not talk to any witness in this case without someone else present (H. App. 1625–1626, 1629–1631, 1632). Rowan did some "leg work" for Shaw and

interviewed Cantellops on occasion.[13] In March or April 1958, Consoli and Rowan were assigned to a Special Squad attached to the United States Attorney's Office for further work on the case.

Rowan testified at the hearings on the motions for a new trial that in 1957 and 1958 he interviewed Cantellops on a number of occasions; that "someone" was always present with him during these interviews; and that he made notes of the interviews on most of these occasions (H. App. 1064–1067, 1071, 1074, 1076–1080, 1083–1084, 1109, 1111; see H. App. 1492). Cantellops spoke rapidly, using poor English, and it was "impossible" for Rowan to keep up with him in taking notes (H. App. 1075, 1077, 1130–1131). The notes were not verbatim (H. App. 1130, 1131). About January 1958, Rowan typed up his rough notes of these interviews, putting them into correct English, his own language, and in chronological order (H. App. 1077–1078, 1080, 1112, 1126–1127, 1131). After coming to the Special Squad, Rowan typed up his rough notes about one or two days after the interviews with Cantellops (H. App. 1083–1084). On occasion, Rowan either read parts of the notes to Cantellops or else gave them to Cantellops to read over (H. App. 1085, 1153–1154). After the completion of all of his interviews

[13] During 1957, Rowan interviewed Cantellops on about five occasions when Shaw was not present (H. App. 1630, 1631). In this same period, Shaw interviewed Cantellops about 30 or 40 times, 20 or 30 interviews dealing with this case (H. App. 1631-1633). Shaw said that he took from about one to one and one half inches of notes, that Rowan took about one tenth that thickness of notes, which were in pencil, and that all of the notes were in the case file (H. App. 1637–1638).

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with Cantellops, Rowan had a stack of rough notes about three inches thick and a stack of typed notes about half that thickness or about 40 or 50 pages of typed notes (H. App. 1085–1086).

Rowan made about three or four typewritten reports of what Cantellops had told him but he never included in those reports any of the information contained in his rough or typewritten notes (H. App. 1095, 1099, 1104, 1117, 1122; see H. App. 2058–2061). The reports gave only a "general picture" of what was happening, and one could not, on reading the reports, gain a "fair idea" of what Cantellops had said during the interviews (H. App. 1099, 1101, 1120–1122). (Substantially verbatim portions of these reports were turned over to defense counsel at the trial (T. Tr. 3172–3173; H. App. 2058–2061).)

According to Rowan, his superiors in the Narcotics Bureau—Agents Angelo Zurlo, John Enright, James Ryan, Charles Ward and George Gaffney—inquired of him as to why he had not been making reports on the case (H. App. 1108, 1113, 1116–1117, 1132–1133, 1134–1136, 1148, 1287, 1289–1290). He told them that if he made reports that they would be "liable to fall under the jurisdiction of the Jencks decision" (H. App. 1111, 1113, 1116–1117, 1140). Rowan's superiors did not directly tell Rowan not to make reports or to destroy records or notes, but Rowan had the "understanding" that he was not to make reports on the case (H. App. 1118–1119, 1161–1162). Rowan's superiors told him to do what he thought best under the circumstances or to proceed as he had been doing

(H. App. 1094, 1111, 1118, 1161). During this period, Rowan made oral reports to Zurlo concerning interviews with Cantellops (H. App. 1088–1089). Rowan explained his views on this matter to Agent Consoli and to someone else on the Special Squad but did not know whether any other agents had not been preparing reports because of this reason (H. App. 1138, 1140–1142). At about the time of the return of the indictment, Rowan destroyed his rough and typewritten notes of interviews, together with some investigative aids, in a squad room in the court house, in the presence of someone, possibly Agent Consoli (H. App. 1090, 1093, 1113, 1146, 1149, 1150–1151, 1155–1156, 1158).

In May 1958, Rowan and Assistant United States Attorney Walsh went over Rowan's notes in the light of Cantellops' grand jury testimony (H. App. 1090–1091, 1123–1124, 1145, 1249–1250). Walsh told Rowan to clear things up which were inconsistent (H. App. 1091). Rowan later assisted Walsh in writing a chronology of Cantellops' testimony which did not reflect the inconsistencies (H. App. 1123, 1145). Since this summary was not "substantially verbatim", Rowan destroyed his notes in order to circumvent the Jencks Act (H. App. 1146).

Rowan testified that he was asked to resign from the Narcotics Bureau by Agent Gaffney, and that he resigned from the Bureau on August 15, 1960 (H. App. 1162).[14] He admitted that he was involved in

[14] Agent Gaffney testified that he met with Rowan in a restaurant after Rowan had left the Bureau, and that Rowan was "upset and distraught", saying that Gaffney "had ruined

an accident with a government automobile in October 1959, and that at first he lied to Gaffney as to the circumstances of the accident (H. App. 1191–1194, 1222–1223, 1229–1230; see H. App. 1588–1590). He did not report the accident to the New York State authorities (H. App. 1204, 1224). He borrowed money from a number of other agents and once from a narcotics informer, and admitted that he did not give Gaffney a "full statement" of the money owed other agents (H. App. 1189–1191, 1221–1222). Rowan admitted that he had been late in filing his expense accounts and in his daily and monthly reports (H. App. 1148, 1290–1291). He admitted that he lied on a loan application with a finance company and that he had lied to his present employer (H. App. 1205–1206, 1229–1230). He said that he had been angry at Gaffney, that he told him that he had ruined his life, but that he had no animosity toward Gaffney (H. App. 1196). Rowan, who was under defense subpoena, said that he had received transportation money from defense counsel and that he had been promised money for the amount of time which he would lose from work testifying (H. App. 1225–1226; see H. App. 1302–1303; D. Ex. "BB").

Rowan also admitted that it was his practice to destroy his notes, after writing up of reports, even before the *Jencks* decision.

(2) Agents Enright, Ryan, Zurlo, Ward and Gaffney, who were supervisors of Rowan in the Nar-

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his life" (H. App. 1583, 1584). Rowan told Gaffney that his wife was going to leave him, that the world was coming to an end, and that everyone hated him (H. App. 1584).

cotics Bureau during the periods in question,[15] testified that they did not directly or indirectly indicate to Rowan to destroy reports, notes or documents relating to the case, or that he should not make reports (H. App. 1492–1493, 1498, 1543, 1544, 1545, 1554–1556, 1557–1558, 1564–1565, 1566–1569, 1577, 1587). The *Jencks* decision was not discussed with Rowan (H. App. 1498, 1553, 1557, 1565–1567, 1577, 1578; see H. App. 1573–1574). Rowan never discussed with them the subject of destruction of documents or sought their approval for such a suggestion (H. App. 1494, 1498, 1544, 1557, 1564–1567, 1577, 1587). Agents Enright and Zurlo, who had more immediate contact with Rowan, never saw him destroy notes (H. App. 1492, 1564–1565).[16] Rowan

[15] Enright was group leader of the Special Squad attached to the United States Attorney's Office (H. App. 1493); Ryan and Gaffney were district supervisors for the Bureau of Narcotics in New York during the periods in question (H. App. 1543, 1576–1578); Zurlo was in charge of the enforcement group to which Rowan belonged in 1957 and early 1958 (H. App. 1557); and Ward was the assistant supervisor for the Bureau of Narcotics during the periods in question (H. App. 1565).

[16] Gaffney said that discussion of such a subject was "unthinkable" (H. App. 1587), that he "absolutely" did not tell Rowan not to make reports, and that any testimony that he did so act had "no semblance of truth, not remotely" (H. App. 1588). Ryan said that he would "never tolerate" the destruction by any agent of pertinent memoranda of a case (H. App. 1544), and that if any agent testified that he, Ryan, directly or indirectly told the agent to destroy pertinent notes and memoranda, that that agent would be a "falsifier" and a "— liar" (H. App. 1554–1555). Enright said that he would not have allowed Rowan to destroy materials (H. App. 1498).

did not tell Gaffney that the reports would be made available to the defense, and Gaffney did not tell him to do what he wanted to do on the matter of reports (H. App. 1577–1579, 1580, 1587).

Agents Consoli, Muglia and Svoboda, who were associated with Rowan during the periods in question, testified they were never instructed by anyone to destroy notes, memoranda or pertinent documents, nor did they see Rowan or any other agent destroying documents in their presence (H. App. 1363, 1365–1366, 1448, 1449, 1450, 1453, 1642–1643). Consoli denied assisting Rowan in the destruction of notes of the case (H. App. 1643). Rowan was never observed possessing 40 or 50 pages of interview notes (H. App. 1365–1366, 1643). Rowan never discussed the *Jencks* decision or its effect on reports with Muglia or Consoli, and Svoboda did not recall whether he discussed that with Rowan or not (H. App. 1364, 1366, 1450, 1453, 1642). They never saw Rowan read his notes to Cantellops or give them to him to read (H. App. 1366, 1449, 1643).[17]

Shortly after this Court decided *Jencks* v. *United States,* 353 U.S. 657, the Bureau of Narcotics sent out to field offices a "legal information circular" advising of the nature and impact of the decision on

[17] Shaw did not tell Rowan or Consoli that they need not make reports, or that he would make out the necessary reports (H. App. 1625, 1627–1629, 1636). He did not discuss the *Jencks* decision with Rowan and did not instruct Rowan to destroy notes (H. App. 1625, 1627, 1628–1629). Instead, he told Rowan to retain his notes which were then made part of the case file (H. App. 1627–1628, 1637–1638).

Bureau work (H. App. 2040–2043; G. Ex. 35). On August 20, 1957, a memorandum from the Commissioner of Narcotics to District Supervisor Ryan in New York set out certain suggestions for use in the preparation of case reports, i.e., use of a new page for the testimony of each witness, the witness should sign at the end of his testimony, etc., in order to aid the Department of Justice "in its efforts to comply with its interpretation of the Jencks decision" and to "simplify the production for inspection" by the defense of case reports (H. App. 2047; G. Ex. 36). On September 9, 1957, this memorandum was adopted and put into effect by the Bureau of Narcotics (H. App. 2044–2046; G. Ex. 36). A later legal information circular advised the Bureau offices of this Court's decisions in *Palermo* v. *United States*, 360 U.S. 343, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (H. App. 2048–2049; G. Ex. 37).

The narcotic agents testified that they met regularly during the periods in question to discuss legal information circulars, Bureau matters and the like, and that some of these meetings dealt with the subject of the *Jencks* decision (H. App. 1456–1458, 1503–1504, 1546–1548, 1553–1554, 1562, 1564, 1568, 1582, 1650). After *Jencks*, the agents were instructed to concentrate on reporting facts in their reports and to omit hearsay and extraneous matter (H. App. 1544–1545, 1574–1575, 1583).

The district court found "Rowan's testimony as to his purpose at the time he destroyed the alleged notes, if in fact there were notes of the character claimed by him, unworthy of belief." 197 F. Supp. at 555.

(3) Consoli testified that he interviewed Cantellops on a number of occasions in 1958 and 1959; and that Rowan often sat in or assisted in the interviews under the practice of having two agents present. If Consoli intended to make a report to or corroborate certain data, he took longhand notes of the interviews (H. App. 823–825, 828, 865, 870–871, 897–898, 899–901, 1644, 1648–1649).[18] The notes did not reflect everything that Cantellops had said and were not verbatim. Consoli waited for Cantellops to express a "whole idea" before he wrote it down (H. App. 900–901). When he was in doubt or wanted further clarification, Consoli went over the substance of some of the notes with Cantellops or read parts of the notes back to him, but Consoli did not show the notes to Cantellops or "confirm" the notes by reading them to Cantellops (H. App. 860, 865, 871–873). Consoli used his notes in the preparation of memoranda on the case which he compared against the notes. The memoranda reflected the substance of the notes without change and were more detailed than the notes (H. App. 858, 873, 902, 1650). Consoli went over the substance of the memoranda with Cantellops, but Cantellops never

[18] A number of interview dates which Consoli had with Cantellops were for the purpose of performing "guard duty" on Cantellops (H. App. 899, 904–905). Some of Consoli's interviews with Cantellops were "lengthy", others were "very brief" (H. App. 899).

The prisoner releases of Cantellops showed that between December 13, 1957, and January 22, 1959, he was released 138 times, at least 136 of which were to narcotic agents. Consoli signed for Cantellops 37 times while Rowan signed for Cantellops 34 times (H. App. 1982-1999).

signed the memoranda or the notes (H. App. 873, 878–879). After the memoranda or reports were approved and ready for filing, Consoli destroyed his interview notes (H. App. 826, 864, 877–878, 902, 1650).[19]

Agent Muglia testified that he interviewed Cantellops on two occasions, and that he took notes of those interviews, recording the highlights of the pertinent data obtained from Cantellops (H. App. 1357–1359). Cantellops spoke rapidly, with poor pronunciation, and one had to listen "very closely" to understand what he was saying (H. App. 1358, 1366). Muglia prepared reports of these interviews, and the reports reflected the notes (H. App. 1358, 1359, 1360–1361, 1362, 1383). After the reports were approved, the notes were destroyed as a matter of routine and for security reasons (H. App. 1361, 1362, 1376–1377).[20]

The court found no bad faith in the acts of the agents and pointed out that Consoli's reports had been made available to petitioners at the trial. Substantially verbatim portions of six of Consoli's reports, four of Rowan's reports and of one of Muglia's reports (as well as other reports) were made available at the trial. See the Statement, *supra*.

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[19] The memoranda or reports indicated to an agent's superiors just what the agent was doing from time to time. The superiors could not change the facts or the substance of the reports, but merely checked them over for spelling, grammar, completeness and clarity of expression (H. App. 881, 882, 903, 1496–1497, 1543–1544).

[20] Some of the confidential reports of the Bureau of Narcotics unaccountably found their way into defense hands during the trial (see T. Tr. 1113A–1113J, 1411–1417; H. App. 1111).

c. Notes and memoranda of Assistant United States Attorney Donald Shaw.

Shaw testified that he interviewed Cantellops on a number of occasions during the investigative part of the case, and that the notes which he took of the interviews were not substantially verbatim (H. App. 1627.) He could not obtain substantially verbatim notes because Cantellops spoke rapidly and in poor English. Shaw had almost to translate what he said to put it into a more "recognizable" form (H. App. 1623). He never showed Cantellops his notes or read them back to him (H. App. 1623). He often added notes to his original notes (H. App. 1633–1634). Shaw's notes reflected what Cantellops testified before the grand jury, and the grand jury testimony of Cantellops, which was turned over to the defense at the trial, was substantially all that Cantellops had told Shaw (H. App. 1626–1627, 1640).

After about six months of investigation, Shaw prepared a chronological statement of facts of the case in which about a dozen sources of information, including Cantellops, were used (H. App. 1621–1623, 1624, 1626). Shaw used files from the F.B.I., the Bureau of Narcotics, the Customs Service and the Internal Revenue Service (H. App. 1624). The chronology was not a substantially verbatim account of what Cantellops had told Shaw (H. App. 1623).

As already noted, Judge Bicks ordered further hearing on the issue of the Shaw notes, 197 F. Supp. at 558. In August 1961, Judge Thomas Murphy was assigned the remainder of the case due to the illness of Judge Bicks (H. App. 1758).

On August 14, 1961, Judge Murphy and counsel for both sides met in open court. The government turned over to the court two envelopes of Shaw materials, one containing Shaw's original notes (H. App. 1829–1913) and the other containing Shaw's chronology of facts. The court did not believe that it was necessary to call Shaw as a witness at that time and adjourned the hearing so that it could read over the materials (T. Tr. 9785, 9787, 9789; H. App. 1778, 1780, 1782–1783).

On December 22, 1961, Judge Murphy ruled that the defense requests at the trial for production of statements and reports of government agents who interviewed Cantellops covered the Shaw materials and that the government should have turned over those materials for an *in camera* inspection. He ruled, however, (1) that the chronology of facts was not substantially verbatim of what Cantellops had said, was not written contemporaneously with the interviews, and that, in any event, since the notes from which information was taken and incorporated into that chronology exist, petitioners would not have been entitled to the chronology; (2) that with the exception of the notes of October 10 and 11, 1957, "virtually the entire contents" of the remaining notes corresponded with Cantellops' grand jury testimony, which had been turned over to the defense at the trial, and hence the defendants in effect already had what the notes contained; (3) and that while the notes of October 10 and 11, 1957, should have been made available to the defense at the trial, their nonproduction did not prejudice petitioners or influence the result. 200

F. Supp. 711. In this regard, the court noted that Cantellops had admitted that he lied before the grand jury in July 1957 and March 1958; that Cantellops testified that he put into operation a preconceived plan to stall for time during which he was to advance any story until he could be reached with bail money or legal assistance by others; that Cantellops was not co-operating during this period; and that it would be "difficult to see how an additional instance of fabrication, not under oath and at a time, consistently, when he was not yet cooperating with the government, could persuade the jury differently" (H. App. 1792–1793). Judge Murphy held that the cross-examination of Cantellops was not "unduly restricted" by the non-production and noted that Cantellops had been subjected to an exhaustive and searching cross-examination for 14 days (H. App. 1792, 1793). The court then denied the remainder of the motions for the new trial, ordering that copies of the October 10 and 11, 1957, notes of Shaw be turned over to defense counsel. 200 F. Supp. 711.

The court of appeals, on February 23, 1962, granted petitioner Genovese's motion to release the remaining notes to the extent that Judge Murphy, in his discretion, might conclude that they were producible Jencks materials (C.A.R. 34). On May 7, 1962, Judge Murphy released 61 pages of Shaw notes (H. App. 1853–1913), noting that he "deem(ed) it more expedient to resolve them in favor of disclosure at this juncture without the delay and expense that a hearing for that purpose would entail." (T. Tr. 9893–9894). He refused to make available 18 pages

of "cryptic or cabalistic notes that never were, and are not now considered by us to be producible" (T. Tr. 9893).

ARGUMENT

1. The conclusion of Judge Bicks, who had presided at the original trial, that the new evidence adduced before him did not warrant a new trial (challenged only by the petitioners in No. 1167 and No. 1515 Misc.) [21] presents no issue for review by this Court. *United States* v. *Johnson*, 327 U.S. 106, 111. The opinion of the district court which reviews the evidence in detail (197 F. Supp. 536) indicates a careful exercise of discretion with respect to matters which are the peculiar province of the district court. See *Campbell* v. *United States*, No. 631, O.T. 1962, decided May 27, 1963.

2. The major complaint of all petitioners arises from the fact that the government at the trial did not turn over to the court the notes taken by Assistant

[21] While petitioner Genovese (whose arguments are adopted by the others) does not here seek further review of the rulings made upon the record as it existed before Judge Bicks, he seeks "to preserve if necessary a claim for remand for further consideration of such grounds" (No. 1168, p. 6). He contends (No. 1168, pp. 43–44) that if the Court holds that the defense was not prejudiced by the nonproduction at the trial of the notes of Assistant United States Attorney Shaw, the Court should nevertheless remand the case to the district court for consideration of the notes (1) as "further evidence" on the first five grounds of the new trial motion and (2) as "evidence on other grounds of the new trial motion", i.e., "newly discovered" pre-trial contradictory statements. We show *infra* that the Shaw notes are neither newly discovered nor significant.

United States Attorney Shaw. In this connection, it is important to bear in mind that the instant proceeding relates to a motion for a new trial based on newly discovered evidence. The question is not whether the failure to turn over the materials was error, but whether it is such a serious error as to justify setting aside a judgment which has already been reviewed on appeal. The conclusion of the courts below that it was not is plainly correct.

a. That Shaw did interview Cantellops and take notes can in no sense be deemed newly discovered evidence. As shown by the Statement, *supra,* Cantellops testified at the trial that between mid-1957 and into 1958, he had been interviewed by Assistant United States Attorney Shaw; that Shaw had examined him before the grand jury; and that, on occasion, he observed Shaw writing or taking notes during interviews. No specific request was made for the Shaw notes or the notes of any Assistant United States Attorney, nor did petitioners voice any complaint at the trial or upon appeal from the convictions that the Shaw notes had not been produced at the trial. Judge Murphy ruled that, while defense counsel knew that Shaw had taken notes of his interviews with Cantellops and "nonetheless did not make a specific demand for the assistant's notes or for a *voir dire* with respect thereto",[22] nevertheless, the de-

[22] Petitioners Mazzie, Charles Di Palermo and Joseph Di Palermo misstate the record when they assert that they were not aware of the Shaw materials at the trial (No. 1329 Misc., p. 8; No. 1330 Misc., p. 8; No. 1475 Misc., p. 8).

These same petitioners, on page 10 of their respective petitions, state that, when the question of the *voir dire* into the Shaw materials "came before Judge Murphy on August 14, 1961, the govern-

fense demands for statements and reports were broad enough to encompass the Shaw materials and that, consequently, "wrongful or negligent non-production on the part of the government" would be assumed 200 F. Supp. at 714. We accept the assumption for present purposes, although it is only fair to the attorney involved to point out that the instant trial was concluded in April 1959, before the decision of this Court in *Palermo* v. *United States*, 360 U.S. 343, at a time when the term "substantially verbatim" was thought to mean the equivalent of a stenographic recording.[23] The question remains whether the failure to turn over documents known to exist, which was

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ment urged that there was no need to hold a further hearing on this matter." The record, however, shows that after producing the Shaw materials in open court on that day, government counsel represented to the court that the "Government has outside Mr. Shaw, who has prepared those notes. He is available to the Court, if the Court wishes to examine him" (H. App. 1761, 1762). Judge Murphy concluded that the first thing that he should do was to read the notes (H. App. 1780, 1782–1783.

[23] At the trial the government turned over to the defense Cantellops' entire grand jury testimony consisting of 312 pages; two question and answer statements from Cantellops; Veteran's Administration medical records regarding Cantellops; Rickers Island medical records of Cantellops when he had been incarcerated there earlier; and portions of numerous reports of narcotic agents. See 197 F. Supp. at 558, fn. 23. The government had turned over to the court for an *in camera* inspection the entire files of the New York Branch of the Bureau of Narcotics regarding the case, and the court, after having spent about thirty hours examining the file, conducted *voir dire* examinations of five narcotics agents (T. Tr. 2013–2042, 3159–3173) in order "to aid the court in determining whether any of [the reports came] within subdivision 1 and 2 of (e) of Section 3500" (T. Tr. 2013).

unchallenged on appeal, requires the granting of a motion for a new trial.

b. Under the ruling of this Court in *Campbell* v. *United States*, No. 631, O.T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500. There is thus no occasion to consider whether the court of appeals applied an improper standard in reviewing these findings, or whether the court of appeals improperly defined and applied the term "substantially verbatim" in section 3500(e)(2), contentions advanced for consideration by petitioners. This Court, in *Campbell*, held that the factual findings and legal conclusions of the district judge in such matters are to be sustained on appellate review unless "clearly erroneous".

It is our position that this standard also applies to the ruling that failure to produce the Shaw documents does not justify a new trial. We think the record here establishes that Judge Murphy's finding that petitioners were not prejudiced was not clearly erroneous; that it was in fact clearly correct.

c. As shown by the Statement, *supra*, Judge Murphy divided the notes into two categories: (1) the October 10 and 11, 1957, notes, consisting of 24 pages; and (2) the remaining notes, consisting of 61 pages. As to the 61 pages,[24] Judge Murphy held that petitioners were not prejudiced by their nonproduction

[24] Actually, there were only about 22 actual pages of notes of October 10 and 11, 1957, because some of the notes were contained on half-pages or less (see H. App. 1836, 1851, 1852). There were, for the same reason, only about 57 actual pages of notes in the other category (H. App. 1853, 1861, 1866, 1888, 1899).

because virtually the entire contents of these notes correspond with Cantellops' grand jury testimony, which had been turned over to the defense at the trial (H. App. 1789). As to the notes of October 10 and 11, he concluded that denial of access did not influence the result. See 200 F. Supp. at 715–718. To this we add that there could not have been any prejudice to the petitioners in this regard because they had already received (and utilized) at the trial other materials pertaining to Cantellops which contained practically the *entire substance* of the information contained in the Shaw notes. See *Killian* v. *United States,* 368 U.S. 231, 244; *Rosenberg* v. *United States,* 360 U.S. 367, 370–371. The basis for these assertions is documented in detail below.

The 61 pages of notes. These notes covered interviews with Cantellops from July 26, 1957 to March 1958 (see H. App. 1853, 1879). Almost their entire substance was contained in Cantellops' July 30, 1957, and March 1958 grand jury testimony which was turned over and utilized by the defense at the trial. Thus the grand jury testimony and the notes indicated that Sol Colletti in 1956 sold narcotics obtained from Ralph Polizzano to Cantellops (G.J. 3–5; compare H. App. 1856–1857); that Cantellops purchased from two to three ounces of narcotics per week from Colletti and resold it to some pushers in Spanish Harlem (G.J. 4–5, 8; compare H. App. 1857); that Cantellops sold narcotics to individuals named Mario and Sienedy (G.J. 5; compare H. App. 1857); that Cantellops met Colletti at a certain gasoline station and picked up narcotics from him there

(G.J. 5–6; compare H. App. 1858); that Cantellops ordered narcotics from Colletti by using a poker game code (G.J. 6; compare H. App. 1858); that about a week before Colletti was arrested Cantellops met Ralph Polizzano at the gasoline station (G.J. 5, 6; compare H. App. 1858); that Ralph Polizzano offered Cantellops a better price for the narcotics (G.J. 6; compare H. App. 1858); that Cantellops thereafter purchased narcotics regularly from Ralph Polizzano during 1956 (G.J. 7; compare H. App. 1859, 1861); that Colletti became angry when he discovered that Cantellops had been purchasing narcotics from Ralph Polizzano (G.J. 8; compare H. App. 1858); that Cantellops contacted Ralph Polizzano two to three times a week regarding narcotic transactions, paying Polizzano directly for narcotics (G.J. 10–12; compare H. App. 1859); that Jack Russo delivered narcotics for Ralph Polizzano to Cantellops at a certain luncheonette (G.J. 10–11; compare H. App. 1859); that Willie Rovira, who owned the Lolita Bar, gave Cantellops some marijuana cigarettes, which he said he had obtained in Chicago from a Mexican syndicate (G.J. 11–12; compare H. App. 1860); that after Cantellops had been released from prison in February 1957 (following a conviction for a marijuana violation), he began to purchase narcotics from Ralph Polizzano again (G.J. 12–13; compare H. App. 1862); that Cantellops mixed the narcotics in Carlos' apartment and "bagged" it on occassion in Victoria's apartment (G.J. 14–15; compare H. App. 1862–1863); that Acevedo, who had sold narcotics for Cantellops, discussed narcotics with him in a bar (G.J. 16–18; com-

pare H. App. 1865); that Cantellops met Barcelona in 1955, and, after discussing a crooked gambling device of Cantellops with him, borrowed $500 from Barcelona (G.J. 31–34; compare H. App. 1868–1870); that Barcellona told Cantellops that he could repay the loan by delivering narcotics to Las Vegas for him (G.J. 34–36; compare H. App. 1870–1871); that Barcellona instructed Cantellops on certain details of the trip (G.J. 35, 39, 221; compare H. App. 1870–1874); that, as Cantellops was conversing with Barcellona about the Las Vegas trip, a young Italian man approached and gave Cantellops a package of narcotics (G.J. 39–40; compare H. App. 1874, 1880); that Cantellops traveled to Las Vegas by way of Los Angeles and Reno (G.J. 38, 39, 222; compare H. App. 1867, 1874–1877); that Cantellops rented a room near the Golden Nugget Casino where he shortly thereafter obtained employment (G.J. 41–42, 223; compare H. App. 1877–1878); that Cantellops delivered a package of narcotics to an Italian man who was about 40 years of age, with black-grey hair which parted down the middle (G.J. 42; compare H. App. 1880); that in the summer of 1956, Cantellops traveled to Miami where he met Carmine Polizzano who, with Cantellops, drove to Tampa where Polizzano entered a certain hotel (G.J. 48, 51–52; compare H. App. 1881–1882); that some "luggage" containing narcotics was subsequently picked up from a middle-aged Cuban (G.J. 52–53; compare H. App. 1883); that Polizzano and Cantellops returned to Miami where Polizzano purchased a train ticket for Cantellops (G.J. 53–54; compare H. App. 1883); that Cantellops returned to New

York and subsequently received a "tip" of narcotics (G.J. 54–56; compare H. App. 1884); that Cantellops diluted this "tip" of narcotics and sold it (G.J. 60; compare H. App. 1884); that Cantellops then travelled to Chicago with a package of narcotics, met Carmine Polizzano and another man there, and subsequently delivered the package to the man by leaving it in a telephone booth (G.J. 66–68; compare H. App. 1885–1886); that, in the summer of 1956, Cantellops met Ormento and a Mexican, and the men discussed a pickup of narcotics from Mexico, which Cantellops refused to go along with because of the absence in the plan of certain details (G.J. 133–135; compare H. App. 1889–1892, 1900–1901); that Cantellops thereafter met in a hotel room with Ormento, Mazzie and the Mexican, and the trip to Mexico was again discussed (G.J. 135–137; compare H. App. 1892, 1902–1905); that Cantellops thereafter met in a hotel room with Ormento, Mazzie, Santora and the Mexican, and the decision was made for Cantellops to pick up the narcotics again in Miami (G.J. 137–139; compare H. App. 1892–1894, 1907–1909); that Cantellops thereafter traveled to Miami where he picked up narcotics in some "luggage" and returned to New York (G.J. 139–141; compare H. App. 1895–1896); that Cantellops delivered the "luggage" to a man near a gas station on Boston Road in New York City (G.J. 141–142; compare H. App. 1896-1899); that Cantellops, while in the company of Ormento and others, had seen Genovese in a restaurant on the east side (G.J. 118; compare H. App. 1908); and that, after meeting with Evola, Ormento and

Mazzie, Cantellops delivered narcotics at a gasoline station in the vicinity of Stockholm and Stanhope Streets in Brooklyn (G.J. 191–192; compare H. App. 1911–1912).

The notes of October 10 and 11, 1957, consisting of 24 pages. The notes of October 10 and 11, 1957, which Judge Murphy held should have been produced at the trial, were devoted almost exclusively to the Las Vegas trip and a Miami-Tampa trip, and with Cantellops' dealings with Ralph Polizzano and one Conrad De la Cruz (H. App. 1824–1852). Practically the entire substance of the notes was contained in other materials which were made available to, and utilized by, the defense at the trial, *i.e.*, two question and answer statements taken from Cantellops (one of which was made before Shaw on October 10, 1957, the very day that Shaw took some of the interview notes in question); Cantellops' grand jury testimony; and portions of reports by narcotic agents turned over to the defense.

In this regard, petitioners were well aware at the trial that Cantellops had told government agents or the grand jury that he had met Conrad De la Cruz in 1955 (H. App. 2050, 2056; compare H. App. 1829); that De la Cruz and Ralph Polizzano were in the narcotics business together (H. App. 2051, 2052; compare H. App. 1829, 1834–1835, 1846, 1848); that Ralph Polizzano, in a meeting with Cantellops at the Old Landmark Bar, asked Cantellops whether he would make a pickup of narcotics in Miami (H. App. 2051–2052; compare H. App. 1829, 1834–1835); that Ralph Polizzano told Cantellops to meet De la Cruz at the

Almanac Bar and that De la Cruz would give Cantellops the details of the trip (H. App. 2052; compare H. App. 1835); that Cantellops, on the following day, met De la Cruz in the Almanac Bar (H. App. 2052; compare H. App. 1835); that De la Cruz and Cantellops discussed narcotics, with De la Cruz telling Cantellops that he did not have to know too much about the subject in order to make the trip (H. App. 2053; compare H. App. 1835); that De la Cruz gave Cantellops a slip of paper with an address and told him to take a taxi to that address when he arrived in Miami (H. App. 2052; compare H. App. 1836); that De la Cruz gave Cantellops expense money and a bus ticket to Miami (H. App. 2052; compare H. App. 1836, 1837); that Cantellops thereafter traveled alone to Florida by Greyhound bus (H. App. 2051, 2052; G.J. 182; compare H. App. 1837); that Cantellops met De la Cruz on the Florida end of the trip (H. App. 2051; compare H. App. 1838, 1841, 1842–1844); that Cantellops picked up narcotics in an old suitcase in Tampa (H. App. 2051; G.J. 183, 186; compare H. App. 1841, 1844); that De la Cruz was in the area when Cantellops picked up the narcotics (H. App. 2051; compare H. App. 1841–1842); that Cantellops thereafter returned to New York by train and gave the narcotics to Ralph Polizzano (H. App. 2051; compare H. App. 1845, 1847); that the Florida trip was at the behest or for the benefit of Ralph Polizzano and De la Cruz (H. App. 2051–2053; compare H. App. 1834–1835, 1844, 1846–1848); and that Ralph Polizzano gave Cantellops a "tip" of heroin which Cantellops diluted and sold (G.J. 188; compare H. App. 1847–1848,

1850). Only insignificant details of the Miami trip were not in the other documents petitioners were given. They did not have, for example, the information that Cantellops spent 8–10 hours on the bus to Tampa; that Cantellops and De la Cruz returned from Tampa to Miami by automobile; that they stopped en route to Miami for some coffee; that De la Cruz purchased Cantellops' train ticket to New York; and that the "luggage" of narcotics weighed four to five pounds (see H. App. 1840, 1841, 1842–1844).

As for the Las Vegas trip, petitioners knew that Cantellops had said that he agreed to deliver narcotics to a man in the Golden Nugget Casino in Las Vegas for $1,000 (G.J. 35–36, 38–40, 41; H. App. 2056, 2060; compare H. App. 1830); that Cantellops, carrying narcotics, left the New York area on a flight to Los Angeles and from there by flight to Reno (H. App. 2038–2039, 2054, 2059, 2060, 2061; G.J. 38, 39, 40, 221–222; compare H. App. 1830–1831, 1837); that Cantellops traveled by bus from Reno to Las Vegas (G.J. 38, 223; compare H. App. 1831); that Cantellops rented a room in a rooming house which was located a few blocks from the Golden Nugget Casino in Las Vegas (G.J. 41, 222; compare H. App. 1830, 1831); that Cantellops thereafter obtained employment in the Golden Nugget Casino (H. App. 2039; G.J. 41, 223; compare H. App. 1831, 1832); that Cantellops subsequently delivered the package of narcotics which he had brought with him to an Italian-looking man whom Cantellops had met at the Golden Nugget Casino earlier (H. App. 2038–2039, 2056; G.J. 42–43; see G.J. 223, 225; compare H. App. 1831–1832); and that,

after having worked for about a week at the Casino, Cantellops returned to New York where he was later paid (H. App. 2038–2039; G.J. 41, 44, 223–224; compare H. App. 1832, 1833).

As for the remaining areas in the notes, petitioners already possessed information that Cantellops had narcotic dealings with Ralph Polizzano, Conrad De la Cruz, Guayamita and Sol Colletti (*e.g.*, G.J. 4–5, 7–8, 9–15, 37, 44, 124–129, 177; H. App. 2050–2053, 2057, 2060; compare H. App. 1829, 1833); that Cantellops had been released from prison on February 11, 1957 (G.J. 12; compare H. App. 1834); that, after Cantellops' release, Ralph Polizzano offered to help Cantellops get back into the narcotics traffic and extended to him some "credit" (G.J. 12, 22, 28; compare H. App. 1834); that Cantellops mixed narcotics in Carlos' apartment (G.J. 14, 15; see G.J. 46, 225; compare H. App. 1850); that Cantellops bagged narcotics and sold it in New York City (*e.g.*, G.J. 8, 13, 14, 188, 203–207; compare H. App. 1850-1851); that Ralph Polizzano had a narcotics "plant" in a basement area near a certain restaurant and received narcotics from Cantellops there (G.J. 9, 188; compare H. App. 1847–1848); that Cantellops discussed narcotics with Ralph Polizzano and that Aviles was in the narcotics traffic (*e.g.*, G.J. 212–213; compare H. App. 1829, 1834, 1846–1848, 1850); that Cantellops mentioned the name of Willie "Rovera" and establishments called the "Lolita" and "Gallo De Oro" (G.J. 11, 12, 205, 206–208, 209, 215; compare H. App. 1851, 1852); that "Junior" worked as a runner for Ralph Polizzano (*e.g.*, G.J. 14, 21–23, 28, 205; H. App. 2056; compare H. App. 1846); that a certain gasoline station or

garage was used for the consummation of narcotic transactions (G.J. 5–6; compare H. App. 1847); and that the Old Landmark Bar and the Squeez-Inn Bar figured prominently in narcotic discussions (*e.g.*, G.J. 5–6, 9, 33, 48, 87, 180; H. App. 2051, 2060; compare H. App. 1834, 1845, 1849).

The only significant area of the notes which petitioners did not already possess in one form or another was Cantellops' assertion that De La Cruz instructed him before he made the Las Vegas trip (cf. G.J. 39–40, 221); that he carried the package of narcotics by strapping it to his back (cf. G.J. 40, 223); that De La Cruz wanted Cantellops to remain in Las Vegas (cf. G.J. 43); and that De La Cruz paid Cantellops the $500 after his return (cf. G.J. 44, 224) (see H. App. 1830, 1833). However, Cantellops testified that during the period when the notes at issue were made, he was "not cooperative" with the government (*e.g.*, T. Tr. 1858). Indeed, Cantellops had been instructed by members of the syndicate to put up "any story" until he could be reached with legal aid or money, instructions which Cantellops put in operation during this period (*e.g.*, T. Tr. 1155–1156, 2904–2905).

Cantellops did not begin to cooperate with the government until about March 1958 when, in a series of grand jury appearances, he implicated all the petitioners except Genovese and Gigante. He did not implicate those petitioners before the grand jury until June 1958, explaining that these men comprised "one of the most dangerous sections of this syndicate", that this had worried him for quite some time, that there was personal danger in exposing these men, but that,

regardless of the personal risk, he would "go ahead and help to the full extent" (G.J. 232–233). Before the jury, counsel hammered again and again at instances of Cantellops prior grand jury perjury and inconsistent statements (*e.g.*, T. Tr. 1838–1839, 1855, 1858, 1868–1872, 1873, 1956, 1963, 2253–2254, 2388, 2411–2413, 2463–2464, 2610–2611, 2659, 2810–2814, 2830–2831, 2869, 2871, 3031–3033, 3122–3123, 3125–3127, 3387, 3443). The record shows that Cantellops was subjected for 14 trial days to a most exhaustive and gruelling cross-examination by able and experienced counsel, who, with wide latitude granted by Judge Bicks, inquired into practically every aspect of Cantellops' background, character, activities both within and outside of the law and matters affecting his credibility as a witness. More than one fifth of the approximately 7,500 page transcript was devoted to cross examination of Cantellops by individual attorneys for the petitioners and others. Under these circumstances the very limited information available only in the Shaw notes was properly held to be unimportant.

3. The destruction of notes by narcotics agents after their reports had been prepared presents no issue warranting review.

a. As to Muglia and Consoli, it is not claimed that there was any bad faith in the destruction of the notes. The reports which were prepared from the notes and turned over to the defense at the trial contained lengthier and more detailed recitals of everything contained in the notes. There was thus no reason to preserve the notes, and certainly failure to do so was no ground for setting aside the conviction. *Killian* v. *United States*, 368 U.S. 231, 242–244.

b. As to Rowan's notes, petitioners are incorrect in their assertion that there is with respect thereto any issue of destruction in bad faith. Judge Bicks found that Rowan had not destroyed those notes—if, indeed, such notes had ever existed [25]—in bad faith. Simply

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[25] Doubt was cast as to the very existence of the 40–50 pages of typewritten notes because none of the other agents ever observed Rowan in the possession of that quantity of notes, and Shaw testified that when he sat down to write a chronology of the facts of the case during the first quarter of 1958, Rowan gave him (Rowan's superior) only about *five pages of typewritten notes* which were of no use to Shaw because they were "cursory and without detail" (H. App. 1365–1366, 1621–1622, 1636, 1643). Although Rowan testified that on occasion he read parts of his notes to Cantellops for clarification or else gave some of the notes to Cantellops to read over (H. App. 1085, 1153–1154), none of the other agents on the Special Squad, including Agent Consoli who had worked with Rowan under Shaw before their assignment to the Special Squad, ever saw Rowan read any of his notes back to Cantellops or give notes to Cantellops to read over (H. App. 1366, 1497–1498, 1643). This was particularly significant since Rowan admitted that he "never was alone with [Cantellops]" (H. App. 1066–1067). Rowan's testimony that on occasion and in the actual presence of Consoli he typed his notes during actual interviews with Cantellops (H. App. 924–925) was contradicted not only by Consoli (and other agents and Shaw) but by the fact that there was no typewriter in the room at the courthouse where Rowan conducted these interviews (H. App. 860–861, 1449–1450, 1637, 1643). Significantly, none of the petitioners thought to recall Cantellops, who was their witness at the hearings, to ask him whether Rowan showed him his interview notes, whether Rowan read the notes back, or whether Cantellops had read them. Cantellops had testified at the trial that he had been interviewed several times by Rowan, and on occasions by other narcotic agents: that he did not know precisely which of the agents had taken notes; and none of the agents showed him any notes and he had not read any of them (*e.g.*, T. Tr. 1585–1586, 1910–1911).

put, Judge Bicks did not believe Rowan, a witness he found to have an "utter lack of veracity and regard for the testimonial oath" and whose testimony was "unreliable to the last degree." 197 F. Supp. at 556–557. Judge Bicks pointed out that a far more plausible explanation for the destruction of any notes was simply that they were destroyed in accordance with Rowan's invariable practice before there was a *Jencks* decision. During the period in question, Rowan wrote four reports from his notes, about the same number of reports as were submitted by other similarly situated agents (see, *e.g.*, T. Tr. 2013–2018, 2019–2025, 2033–2037, 2042–2044). Substantially verbatim portions of each report were turned over to the defense at the trial (T. Tr. 3172–3173; H. App. 2058–2061). Thus, the situation as to Rowan is the same as to the other agents. The defense received reports embodying the notes, but not the underlying notes which were destroyed after the reports were prepared.

CONCLUSION

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

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JULY 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963